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No. 03-851

Supreme Court, U.S.
FILED
JAN 9 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RAY STOVALL and PHYLLIX STOVALL,

Petitioners,

v.

CITY OF STREETSBORO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio, Portage County

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a state supreme court not reviewing and voiding a summary judgment that was obtained with the participation of a non-attorney, which judgment was affirmed on appeal and not vacated under a subsequent Civil Rule 60(B) decision, which decision was also affirmed on appeal, violate the Due Process Clause or the First Amendment?[1]

[1] Petitioners frame the question "Whether the refusal of the state supreme court to review and set aside a judgment in favor of the City that disposed of the Petitioners' discrimination-based defense of the City's claim was a violation of the Due Process Clause or the First Amendment right to petition for a redress of grievances where, unknown to the Petitioners, they were represented in the case by an individual who was not a licensed attorney, but a fraudulent imposter who had been convicted of 44 felony counts of unauthorized practice of law?"

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STATEMENT OF THE CASE

Respondent City of Streetsboro (the "City"), under the authority of its ordinances adopted pursuant to the Ohio Constitution, requires any homeowner constructing a retaining wall that exceeds four feet in height to first obtain a City building permit and a grade and fill permit. The permits are required to verify compliance with basic safety regulations. In August 1998, Petitioners Ray and Phyllix Stovall (the "Stovalls") began constructing a six-foot high retaining wall on their residential lot located within the City without such permits. The City filed an action in the Common Pleas Court, Portage County, Ohio (Case No. 99CV532), seeking to enjoin the construction. The Stovalls defended by arguing selective enforcement and that they were initially told by a City official that they did not need permits. On July 28, 2000, the Common Pleas Court entered summary judgment for the City and against the Stovalls, finding that construction of the retaining wall required City permits and ordering the Stovalls to remove the wall (the "Judgment"). Pet., App. at 10.[2] The Stovalls appealed to the Eleventh District Court of Appeals, Portage County, Ohio (Case No. 2000-P-0089).

Soon after filing the appeal, it came to light that a non-attorney had represented the Stovalls in the Common Pleas Court. To remedy the situation, the Court of Appeals gave the Stovalls the choice of either hiring an attorney or proceeding with their appeal *pro se*; a choice all litigates face. The Court of Appeals gave the Stovalls 20 days to

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[2] Reference is made throughout this brief to the Petition for Writ of Certiorari and the Appendix attached thereto.

decide, stating that if they did not file any new submission (their appellant brief had already been filed) within that time, it would assume that they chose to proceed *pro se*. The Stovalls did not file any new submission, so the Court of Appeals considered their appeal *pro se*. The Court of Appeals affirmed the Judgment, finding that the retaining wall was a "structure" that required a building permit and that its construction involved grading and filling that required a grade and fill permit. Pet., App. at 13, 16.

Thereafter, the Stovalls hired an attorney and filed an Ohio Civil Rule 60(B) motion for relief from the Judgment in the Common Pleas Court, arguing that the non-attorney caused them to lose on summary judgment and submitting the evidence they contend should have been submitted on their behalf in the summary judgment proceedings. On January 31, 2002, the Common Pleas Court overruled the motion, finding that the Stovalls did not present any new facts to warrant vacating the Judgment. Pet., App. at 8, 9. The Stovalls once again appealed to the Court of Appeals (Case No. 2002-P-0018), who affirmed the decision. Pet., App. at 1. The Stovalls then appealed to the Ohio Supreme Court (Case No. 03-1008), which denied review on September 10, 2003. Pet., App. at 27. This Petition for Writ of Certiorari was filed on December 10, 2003.

SUMMARY OF ARGUMENT

The thrust of the Stovalls' Petition for Writ of Certiorari is that because they were represented by a non-attorney during the summary judgment proceedings in the Common Pleas Court, the Judgment, which was the result of those proceedings, was void *ab initio* and could not be

cured by subsequent proceedings. Therefore, they reason, by denying review, the Ohio Supreme Court denied them of their federal rights. Assuming that not voiding a judgment obtained with the participation of a non-attorney raises a federal question, such question is being raised for the first time here. The question of whether the Judgment is void was not addressed by or presented to the Ohio Supreme Court, the Court of Appeals, or the Common Pleas Court.

Nevertheless, the City maintains that any harm that might have occurred as a result of the non-attorney's participation in the Judgment was remedied by the Court of Appeals when it gave the Stovalls the opportunity to hire new counsel (to address any perceived error); and their rights were protected *first* by the Court of Appeals' *de novo* review of the Judgment; *second* by their subsequent Civil Rule 60(B) motion; *third* by the Court of Appeals' review of the decision overruling such motion; and *fourth* by the Ohio Supreme Court's review of their Memorandum in Support of Jurisdiction.

Importantly, the Stovalls do not contend that the Ohio courts applied the wrong law or standard of review during the summary judgment or Civil Rule 60(B) proceedings. Rather, they simply do not like that the facts, when applied to such law, do not warrant vacating (or voiding) the Judgment.

Finally, the Stovalls erroneously assert that the Judgment, being not void *ab initio*, is in conflict with a few state appellate cases. However, the cases cited are either distinguishable on the facts or simply do not present a conflict.

REASONS FOR DENYING REVIEW

I. THE STOVALLS' CONTENTION THAT THE JUDGMENT IS VOID WAS NOT ADDRESSED BY OR PRESENTED TO THE OHIO SUPREME COURT

The Stovalls contend that federal law requires that the Judgment is void, and not merely voidable, and argue that, by not voiding the Judgment, the Ohio Supreme Court acted contrary to federal law. But the Stovalls did not present this argument to the Ohio Supreme Court, the Court of Appeals, or the Common Pleas Court. Rather, to the contrary, by filing an Ohio Civil Rule 60(B) motion, the Stovalls argued that the Judgment was *voidable*. Because unlike Federal Rule of Civil Procedure 60(b), Ohio Civil Rule 60(B) does not provide for vacation of a *void* judgment. *Patton v. Diemer*, 35 Ohio St.3d 68, 70, 518 N.E.2d 941 (1988).

With very rare exceptions, this Court has adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision the Court has been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). The Stovalls did not satisfy this rule, nor did they reference the record with respect to such "federal question" as required under Supreme Court Rule 14(1)(g)(i). For these reasons alone, review should be denied.

II. THE STOVALLS WERE NOT DENIED DUE PROCESS OR AN OPPORTUNITY TO PETITION TO REDRESS GRIEVANCES

When presented with the non-attorney issue, the Court of Appeals provided that the Stovalls could either hire new counsel or proceed *pro se*. Pet., App. at 21. Thus, the Stovalls had an opportunity to be heard on whether they believed the non-attorney had caused them harm, and they had an opportunity to supplement their appellant brief. It is telling that at that time – with the matter of having been represented by a non-attorney clearly before them – the Stovalls did not hire new counsel but chose, through their inaction, to proceed *pro se*. It was only *after* the Court of Appeals affirmed the Judgment that they sought the need to hire an attorney. Under the circumstances, the Stovalls should not now be heard to complain that the Judgment violates their rights.

Further, the Court of Appeals reviewed the summary judgment proceedings *de novo*, applying the same Ohio Civil Rule 56 law as applied in the Common Pleas Court. Pet., App. at 15, citing *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau*, 88 Ohio St.3d 292, 725 N.E.2d 646 (2000), and *State ex rel. Morley v. Lordi*, 72 Ohio St.3d 510, 651 N.E.2d 937 (1995). In other words, the evidence submitted in the Common Pleas Court was reviewed by the Court of Appeals, and showed that there was no genuine issue and that reasonable minds could come to but one conclusion: Constructing a six-foot high concrete slab wall required City permits. Pet., App. at 16. The Judgment was affirmed.

Thereafter, instead of appealing to the Ohio Supreme Court arguing that the Judgment was void, as they contend here, the Stovalls filed a Civil Rule 60(B) motion for

relief from the Judgment in the Common Pleas Court. Pet., App. at 41. Since the purpose of Civil Rule 60(B) is remedial in nature, to be liberally construed so that ends of justice may be served, *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996), a substantial error in the Judgment caused by the non-attorney could be cured by vacating the Judgment. Thus, the Judgment was subjected to further scrutiny under a process that afforded the Stovalls yet another opportunity to be heard and to redress before the court who rendered the Judgment any errors therein.

In *Link v. Wabash Railroad Company*, 370 U.S. 626, 632, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), a federal trial court dismissed an action with prejudice for failure to prosecute, without notice to the plaintiff. On appeal, the plaintiff argued that the trial court violated his due process rights. This Court did not agree. This Court further stated that "the availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60(b) . . . renders that lack of prior notice of less consequence. Petitioner never sought to avail himself of the escape hatch provided by Rule 60(b)." *Id.* at 632. If the *availability* of a Civil Rule 60(b) motion renders a due process issue of "less consequence" – where no opportunity to be heard was afforded – then clearly the *use* of such a process renders the due process issue here of little or no consequence.

The Common Pleas Court overruled the Civil Rule 60(B) motion, finding that the Stovalls did not offer any new facts to warrant vacating the Judgment. Pet., App. at 8, 9. The Stovalls appealed to the Court of Appeals, who affirmed the decision. The Court of Appeals stated that the Stovalls "are attempting to get another opportunity to

argue the same facts and issues already brought before both the trial court and this court." Pet., App. at 4. It further stated that the affidavits contained in their "motion to vacate simply restate the facts as contained in [their] summary judgment motion from the original action, thus failing to provide any new evidence." Pet., App. at 5.

With these proceedings before it, the Ohio Supreme Court correctly recognized that the Stovalls were not denied any federal rights. Its decision to deny review is sound and need not be reviewed here.

III. THE CASES CITED BY THE STOVALLS DO NOT CONFLICT WITH THE OHIO SUPREME COURT'S ENTRY DENYING REVIEW

The Stovalls contend that the Ohio Supreme Court's entry denying review conflicts with (A) other unnamed states on issues of due process and the right to petition for redress of grievances, Pet. at 12; and (B) a purported legal principle in Ohio and other states that a judgment obtained with the participation of a non-attorney is void. Pet. at 15. Though the Ohio Supreme Court's entry denying review was not a decision on the merits, so it could not be conflicting with a decision on the merits, nevertheless, these contentions are not supported by the cases cited by the Stovalls.

(A) The entry denying review is consistent with the due process and redress cases cited

Under this contention, and without any reference to the facts, the Stovalls cite several cases of this Court that stand for the proposition that due process and the right to access to the courts are fundamental. The Stovalls do not

examine how the process afforded them denied them of these rights; or how the Ohio Supreme Court denied them such rights. Rather, as throughout these proceedings, the Stovalls engage in the practice of ignoring the facts by concluding that they have been denied their rights.

The Ohio courts have protected the Stovalls' rights, consistent with the holdings of this Court. Therefore, the Ohio Supreme Court's decision to deny review is sound and need not be reviewed here.

(B) The entry denying review is consistent with the other cases cited

The Stovalls cite *Alliance Group, Inc. v. Rosenfield*, Pet. at 15, an Ohio appellate case, for the proposition that a judgment obtained with the participation of a non-attorney is void. The case does not stand for such proposition. Rather, *Rosenfield* involved the filing of a complaint by a non-attorney corporate agent. The only pleading the Stovalls filed in this case was their answer to the complaint, which was filed by an Ohio attorney. The Stovalls then cite *Russell v. Dopp*, Pet. at 15, a California appellate case, and *State ex rel. Mather v. Carnes*, Pet. at 15, for the same proposition. *Carnes* involved a non-attorney filing a motion to quash, which violated a local rule rendering service on the motion a nullity, and does not stand for the stated proposition.

The peculiar facts in *Dopp* did lead that court to find that a judgment obtained with the participation of a non-attorney was irregular, under a California rule of civil procedure, and should be reversed (unless Dopp knowingly hired the non-attorney). *Russell v. Dopp*, 36 Cal. App. 4th

765, 780 (1995). In *Dopp*, defendant Dopp hired an attorney to represent her but that attorney's father, a non-attorney, represented her at trial. The matter came to light while the jury was deliberating. The trial court immediately removed the non-attorney from the case but allowed the jury to further deliberate and render a verdict, which was against Dopp. Dopp then hired another attorney who filed a motion for new trial under California's code of civil procedure, arguing that because she had been represented by a non-attorney the trial was irregular.

The facts here are far different than those in *Dopp*. Here the non-attorney filed, and responded to, a motion for summary judgment. Unlike a jury trial, a motion for summary judgment turns on the evidence; persuasive argument and witness credibility are not to be considered. Further, unlike a jury trial, in Ohio, summary judgment proceedings are reviewed *de novo* on appeal, applying the same law applied in the lower court. Indeed, unlike the jury verdict in *Dopp*, the Judgment was reviewed *de novo* by the Court of Appeals (after the Stovalls had an opportunity to hire new counsel), and was scrutinized further under the Civil Rule 60(B) proceedings and appeal. Clearly, being represented by a non-attorney in a jury trial raises more due process issues than a non-attorney filing a complaint or motion.

However, the law applied here – that a judgment is voidable under the rules of civil procedure – is similar to the law applied in *Dopp*. Ohio Civil Rule 60(B), as the civil rule applied in *Dopp*, allows relief from a judgment if the applicant can satisfy the rule. The Stovalls were not able to satisfy the rule. The Common Pleas Court and Court of Appeals both found that the Stovalls failed to show that they had a meritorious defense to present should relief

from the Judgment be granted. Pet. at 8-9; Pet. at 5. The Ohio Supreme Court did not see the need for further review.

Finally, Supreme Court Rule 10(b) provides that a reason to grant a petition for writ of certiorari is that a state court of last resort has decided a federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals. The cases cited by the Stovalls are *not* from state courts of last resort. Although not exclusive, Rule 10(b) suggests that such decisions are less important in determining whether a reviewable conflict exists. This shortcoming, combined with this Court being asked to review a decision that is not on the merits, is another reason why review should be denied.

IV. THE STOVALLS MAKE SEVERAL MISSTATEMENTS OF FACT

In their Statement of the Case, the Stovalls make several misstatements of fact, which the City points out in accordance with Supreme Court Rule 15(2).

First, the Stovalls euphemistically refer to their retaining wall as a "botanical rain garden" when, in fact, it is constructed of concrete slabs (about 2' high x 3' wide x 4' long) put in place by a machine and stacked six-feet high. When viewed in this light, it becomes clear that the structure requires a building permit.

Second, the Stovalls state that they "were told that no permit was needed for the rain garden facility and so

proceeded to install it." Pet. at 4. This statement contradicts the Court of Appeals findings in reviewing the Judgment *de novo*. Pet., App. at 18.

Third, the Stovalls state "that retaining walls of similar heights to the rain garden had been and were being installed by over 42 white residents without the issuance of any permits and that the City was taking no action against them . . . " Pet., at 4. The issue raised by this allegation has already been decided. The Court of Appeals twice, first in its *de novo* review of the Judgment, and again in its review of the decision overruling the Civil Rule 60(B) motion, found that the Stovalls did not prove selective enforcement or discrimination. Pet. at 15, 18; Pet. at 5.

Fourth, the Stovalls contend that the non-attorney did not file any Ohio Civil Rule 56(C) quality evidence. Pet. at 5. This statement is incorrect. The non-attorney did file affidavits with the Stovalls' motion for summary judgment, which the Court of Appeals found were substantially similar to the affidavits filed with their Civil Rule 60(B) motion. Pet. at 5.

Fifth, the Stovalls contend that giving them only 20 days to decide whether to hire an attorney or proceed *pro se* was not enough time. Pet. at 6. However, the Stovalls hired their present attorneys within about 12 days after the Court of Appeals affirmed the Judgment (and their attorneys promptly filed the Civil Rule 60(B) motion).

Sixth, the Stovalls list eight things that the Common Pleas Court "knew" when they filed their Civil Rule 60(B) motion that are not entirely correct. Pet. at 7-8. Item (1), that the Stovalls had not been deprived of due process or their day in court, is argument and not fact. Item (2), the

non-attorney *did* submit affidavits with the Stovalls' motion for summary judgment. Items (3) and (4) are speculative at best. The affidavits submitted with the Stovalls' Civil Rule 60(B) motion, which were substantially the same as those attached to their motion for summary judgment, did not represent a meritorious defense to the claim that the Stovalls were required to first obtain City permits. Item (5), see the second response to misstatements of fact above. Items (6) and (7) intimates that the City "reversed" itself because the Stovalls are black persons and "likely" denied them equal protection. The City has not discriminated against the Stovalls. See the third response to misstatements of fact above. Finally, if Item (8) is true, then the Stovalls would be entitled to a City grade and fill permit, which, along with the building permit, they have never applied for.

CONCLUSION

The City respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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